MAR 10 1955
HAROLD B. WILLEY, Cl

IN THE

# Supreme Court of the United States

October Term, 1954
No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,
*Appellants,*

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,
*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

HAROLD L. RUSSELL,
Suite 825,
The Citizens & Southern National Bank Bldg.,
Atlanta 3, Georgia,
*Attorney for Appellants.*

GAMBRELL, HARLAN, BARWICK, RUSSELL & SMITH,
ROBERT R. RICHARDSON,
*and*
THEODORE M. FORBES, JR.,
of Atlanta, Georgia,
*Of Counsel.*

Dated: February 14, 1955.

In the

# Supreme Court of the United States

October Term, 1954

No. 508

Southern Bakers Association, Inc., and
Atlanta Baking Company, Inc.,

*Appellants,*

—v.—

United States of America and Interstate
Commerce Commission,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees in this action have filed a "Suggestion of Mootness" asking this Court to refuse to consider this case and to remand it to the district court. Appellees argue that the question presented is now moot and that it is not substantial. Inasmuch as appellees' "Suggestion of Mootness" is effectively a motion to dismiss under Rule 16(1) of the Rules of this Court, this brief is being filed in opposition thereto pursuant to Rule 16(3).

Appellants' Statement as to Jurisdiction anticipated much of appellees' arguments and this brief will supplement that Statement.

IN THE

# Supreme Court of the United States

October Term, 1954

No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,

*Appellants,*

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees in this action have filed a "Suggestion of Mootness" asking this Court to refuse to consider this case and to remand it to the district court. Appellees argue that the question presented is now moot and that it is not substantial. Inasmuch as appellees' "Suggestion of Mootness" is effectively a motion to dismiss under Rule 16(1) of the Rules of this Court, this brief is being filed in opposition thereto pursuant to Rule 16(3).

Appellants' Statement as to Jurisdiction anticipated much of appellees' arguments and this brief will supplement that Statement.

**The Case Is Not Moot**

The decision of the United States District Court for the District of Kansas in *Kansas State Corporation Commission* v. *United States,* Civil Action T-854 (July 29, 1954; not reported), did set aside the Interstate Commerce Commission order here attacked but the Kansas Court remanded the proceeding to the "Commission for its further consideration." The Kansas decision did not grant the relief sought by appellants herein.

The import of that decision was that the increased rates complained of by appellants here were not increased sufficiently by the Commission to conform to the Commission's findings of preference and prejudice. Thus "further consideration" by the Commission threatens appellants with even greater injury than that which prompted the appeal in the instant case.

Most importantly, the Kansas decision does not dispose of appellants' contention here which is that the proceedings before the Commission were absolutely null and void because of the Commission's failure to publish the notice which appellants claim is required by Section 4(a) of the Administrative Procedure Act. And "further consideration" (in accordance with the Kansas decision) by the Commission of a proceeding which is a nullity could, insofar as appellants are concerned, only lead to a compounding of the illegality. The null and void proceedings before the Commission must, according to appellants' view, be completely set aside, and not considered further.

Of course, as appellees state, "a cause becomes moot when subsequent events end the controversy." But here, appellants' controversy continues and the threat to appellants' interest is unabated. Appellees have also overlooked the principle that a question involving the public interest which is capable of repetition and is likely to recur will

be decided by this Court to provide a guide for action by public officials in future cases irrespective of considerations of "mootness" (see authorities cited in Jurisdictional Statement 10-11). The authorities cited by appellees are not applicable here and are readily distinguishable from the present situation. Furthermore, examination of those cases shows this Court recognizes that the type of question here involved does not become "moot" even though the immediate controversy may have ended. In *St. Pierre* v. *United States*, 319 U. S. 41, 63 S. Ct. 910 (1943), a case cited by appellees, this Court expressly stated that case was different from the case of *Southern Pacific Terminal Corporation* v. *Interstate Commerce Commission*, 219 U. S. 498, 31 S. Ct. 279 (1911), relied upon by appellants. The controversy here has not ended—but even if it had, the question presented is one which should be determined by this Court.

Appellees claim that it is not possible now to predict the nature of the order which will eventuate from the reopened proceeding before the Commission, or whether, on its conclusion, there will be any basis for the claim of procedural error asserted on the instant appeal. The Commission has already embarked upon further hearings but notice was not published in the Federal Register. The very same ground of procedural error which appellants assert here may later be asserted as invalidating any order which will result from the reopened proceeding. However, that is immaterial because appellants contend that the prior record is null and void for lack of notice. No order based either in whole or in part on that record could be valid, even as against appellants, until the required notice were given and appellants received opportunity for full cross-examination and rebuttal presentation with respect to that record. Furthermore, irrespective of notice to appellants and appellants' opportunities for cross-examination and rebuttal with respect to the prior record, lack of legally-

required notice may be a jurisdictional defect which would invalidate the entire proceeding irrespective of actual notice to any particular party.

Appellees also state that the record of the prehearing conference of the reopened proceeding before the Commission indicates that appellants will be afforded full opportunity for cross-examination and rebuttal presentation with respect to the prior record. Actually, the record of the prehearing conference shows that the parties to the original proceeding would not agree to produce for cross-examination the witnesses who presented evidence in the prior record, as shown by pages 1052-1053 of the record of that conference.

In any event, the Commission could not by grafting any amount of patchwork on the prior null and void record cure its failure to publish the notice which appellants maintain was required by the Administrative Procedure Act. Unless this Court acts on this appeal, the Commission will compound its previous legal error. The action complained of is capable of repetition and has, in fact, already recurred. This Court's decision is necessary as a guide to public officials in future cases. Under these circumstances the case should not be dismissed as moot (authorities cited in Jurisdictional Statement 10-11).

## The Question Presented Is Substantial

Appellants' statement as to jurisdiction effectively refutes the argument of appellees that the question presented is not substantial.

The question is whether or not the general public, the people who pay rates and charges, will be given notice of rate-making proceedings. That question, on its face, is a question of grave public importance.

This Court's resolution of that question will also have widespread effect upon the procedural practices of all administrative bodies.

The answer to the question must be found in Section 4(a) of the Administrative Procedure Act, which has not previously been interpreted by this Court or any court other than the district court in this proceeding. The courts of this country have been quick to find that failure to give notice of proposed legislative, or administrative, action, as required by Federal or State law, or constitutions, renders any action taken null and void.

Appellants' standing to bring this suit has not been questioned. It is absurd to maintain that appellants are not subject to the rate-making orders of the Commission and that, therefore, the exception to Section 4(a) of the Administrative Procedure Act applies. No persons could be more directly subject to a rate-making order than the persons who pay the freight, and those persons are the shippers, consignees, consumers and general public who were not personally served and who are not claimed to have had actual notice of the proceeding before the Commission.

It is not necessary to burden this brief with a recitation of the notices which the Commission has actually published in the Federal Register with respect to other rate proceedings. Examination of the Register will show frequent notices published by the Commission in rate proceedings. Quite obviously, some direction by this Court is required to assure uniformity in practice, both by the Commission itself and by other administrative agencies.

If the general public, shippers, consumers and consignees are to be denied, through the interpretation of the Administrative Procedure Act insisted upon by appellees, general public notice of rate-making proceedings which directly and vitally affect them, this Court should so rule. It is too important a matter to be finally determined by failure of this Court to review a district court decision. On the other hand, if the Administrative Procedure Act is to be interpreted as appellants maintain it should be, and so as

to insure to the general public, shippers, consumers and consignees, public notice of rate-making proceedings which directly and vitally affect them, this Court should so rule, so that administrative agencies charged with conducting their proceedings in accordance with the requirements of the Administrative Procedure Act will abide by the requirements of that Act.

## CONCLUSION

The case is not moot, the grounds which prompted appellees "Suggestion of Mootness" being without merit. The case presents a substantial question of procedure which requires plenary consideration by this Court, with briefs on the merits and oral argument, for its resolution. Appellants urge this Court to deny appellees' motion to dismiss, to note probable jurisdiction and to set this case down for argument.

Respectfully submitted,

HAROLD L. RUSSELL,
of Atlanta, Georgia,
*Attorney for Appellant.*

GAMBRELL, HARLAN, BARWICK, RUSSELL & SMITH,
ROBERT R. RICHARDSON,
*and*
THEODORE M. FORBES, JR.,
of Atlanta, Georgia,
*Of Counsel.*

Dated: Atlanta, Georgia,
February 14, 1955.